

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S OPPOSITION TO SIMMONS FOODS,
INC.'S MOTION FOR PROTECTIVE ORDER [DKT #1779]**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State") hereby responds to Simmons Foods, Inc.'s Motion for Protective Order and Incorporated Brief in Support [DKT #1779].

I. Background

In June of this year, Defendant Peterson Farms, Inc. ("Peterson") purchased Defendant Simmons Foods, Inc.'s ("Simmons") poultry operations. In order to determine how this transaction impacted Simmons' and Peterson's liabilities in this case -- obviously highly relevant information -- the State served Simmons and Peterson with four straightforward requests for production seeking documents related to the transaction. Rather than producing the responsive documents and asserting whatever objections and confidentiality claims might have been appropriate, Simmons and Peterson refused to answer the requests and asked to meet and confer with the State. The meet and confer was unsuccessful, with Simmons and Peterson refusing to accept the State's offers of compromise. For example, the State proposed that Simmons and

Peterson provide it with an index or outline of the Asset Purchase Agreement (APA), so that counsel for the State could better understand the scope of the agreement and have a context in which to potentially narrow the requests. Similarly, the State also proposed that Simmons and Peterson allow counsel for the State to have a "quick peek" at the APA. Rather than agree to either of these entirely reasonable proposals by the State, Simmons and Peterson informed counsel for the State a mere two business days before the discovery responses were due that the State would either have to accept production of a selection of documents that Simmons and Peterson had unilaterally limited to suit their own desires or face a motion for protective order. This unilateralist position was unreasonable and unacceptable. Simmons and Peterson then filed motions for a protective order.

II. Argument and Authorities

The four requests for production regarding the purchase of Peterson by Simmons are straightforward, relevant requests that do not create any undue burden for Simmons. As demonstrated below, Simmons is not entitled to protection from them.

A. Request No. 1

The State's request no. 1 seeks "copies of all transaction documents (including any indemnification agreements) pertaining to [Simmons'] acquisition of Peterson Farms, Inc.'s poultry operations that was announced on or about June 3, 2008." *See* Ex. 1. Where there has been a transfer of assets between two defendants to an action, the plaintiff is, in order to ensure that liability is properly assigned, entitled to documentation reflecting the nature of the assets transferred, the manner of the transfer, whether fair value has been given for the assets transferred, whether there are any agreements regarding liability or indemnification, and the like. The logical place to find such information is in the transactional documents, as so that is

precisely what the State requested. Simmons' motion complains, however, that this request seeks information that is irrelevant, overly broad and confidential. Simmons' complaints should not be credited.

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by the discovery would outweigh the ordinary presumption in favor of broad disclosure." *General Electric Capital Corp. v. Learn Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003). The Supreme Court interprets relevancy in the discovery context "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc., v. Sanders*, 98 S. Ct. 2380, 2389 (1978).

As explained above, Simmons clearly cannot establish that discovery of the transactional documents are irrelevant. Indeed, discovery regarding the identity of defendants and the holders of assets and liabilities is plainly relevant and several courts have permitted discovery of this type of information after a transaction between potentially liable parties. *See, e.g., Great American Ins. Co. of New York v. TA Operating Corp.*, 2008 WL 1848946 (S.D.N.Y. April 24, 2008) (granting plaintiffs' motion to compel discovery regarding acquisition and reorganization of defendant corporation); *Moriarty v. LSC Illinois Corp.*, 1999 WL 1270711 (N.D. Ill. Dec. 29,

1999) (denying defendants' motion for protective order and granting plaintiffs' motion to compel financial records, documentation of ownership interest, and identification of individuals with ownership interest to determine issue of successor liability); *Reed v. Lawrence Chevrolet, Inc.*, 14 Fed. Appx. 679 (7th Cir. 2001) (holding that district court should have allowed plaintiff to conduct discovery regarding circumstances of transaction in which defendant was acquired by another company).

Peterson and Simmons are taking a completely unrealistic position on the importance and relevance of the asset purchase that occurred between them. Simmons claims that because only the birds it purchased from Peterson are located in the IRW, and the other poultry production assets it purchased are outside the IRW, that discovery regarding the transaction is irrelevant. This argument is nonsensical because the live production assets that Simmons purchased from Peterson are located in Decatur, Arkansas (just minutes north of the IRW), and these assets are the business entities that manage the production of the birds *in* the IRW. *See* Ex. 2, Wilkerson Dep. Tr., pp. 56-65 (explaining Peterson's live production business is based in Decatur, Decatur is where grower records are kept, and where live production service technicians are based); Ex. 3, Kinyon Dep. Tr., pp. 13-15 (explaining that Peterson corporate offices and feed mill were located in Decatur, with an approximate 40 mile radius in which Peterson growers were located). It appears from the representations made by Peterson and Simmons in their motions for protective order that the transaction involved the most important part of Peterson's business that relates to this case, the live production business that grows birds in the IRW.

Finally, Simmons asserts that the APA and related documents contain highly confidential information that should not be produced, even if relevant, because of the potential detrimental effect it could have on Simmons' business. This argument is wholly unpersuasive because it

ignores the fact that in November 2006 this Court entered a confidentiality order in this case that provides protection for sensitive business information. *See* DKT # 985. With the confidentiality order, the Court recognized that this case involves the production of business information, and involves competitors in the same industry that would have to disclose business information they otherwise would not be inclined to share. Thus, the confidentiality order provided methods for protecting such confidential business information. Specifically, the order provides for a "Confidential" designation that protects designated documents from disclosure to third parties except for preparation of the case, and a "Confidential: Attorneys' Eyes Only" designation that protects designated information from disclosure to third parties as well as a further level of protection for Defendants from each other, since they are competitors in the same industry. *See* DKT# 985, pp. 2-6. The confidentiality order provides more than adequate protection for the relevant information the State is requesting about the Simmons and Peterson transaction. Thus, Simmons' arguments regarding potential harm that could occur with disclosure of its business information are baseless, since the Court has already put procedures in place to protect that information.

In short, this request is not a fishing expedition, but a simple request for highly relevant material. If the transaction is as straightforward and limited as Simmons' counsel claims, then it should not be burdensome for Simmons to simply produce the limited number of documents that pertain to the transaction, which should amount to no more than a banker's box or two of material. Simmons' assertion that the State should narrow its request or be satisfied with a severely redacted copy of the APA is unacceptable. The State is entitled to production forthwith of a full set of the transactional documents in order to ensure that it has a complete and accurate

picture of transfer of assets between these two Defendants in this case.¹ Simmons' request for protection as to this request should be denied.

B. Request No. 2

The State's request no. 2 seeks "copies of any documents referring or relating to any environmental due diligence activities, reports, disclosures or investigations pertaining to [Simmons'] acquisition of Peterson Farms, Inc.'s poultry operations that was announced on or about June 3, 2008." *See* Ex. 1. As the State understands the transaction, the assets transferred to Simmons under the APA included Peterson's birds. Birds, irrespective of where they are raised, produce waste. Waste pollutes water. Environmental due diligence activities, reports, disclosures and investigations would presumably address the pollution caused by Peterson's poultry operations. This Court has held not only that knowledge of Defendants of pollution from poultry operations is relevant, but also that it is not limited to the IRW. *See* July 6, 2007 Order

¹ Simmons cites *Hope for Families & Community Service, Inc. v. Warren*, 250 F.R.D. 653 (M.D. Ala. 2008), in a strained attempt to support its argument that the documents pertaining to its purchase of Peterson should not be produced. In *Hope for Families*, a civil RICO case was brought against a county sheriff and a privately held gambling company. The plaintiffs sought discovery of the revenue and profits of the gambling company, which the company sought to protect from discovery. The court explained that a RICO claim contained no economic motive requirement, and also that it was common knowledge to reasonable people in the district who may be called as jurors that the gambling company was very profitable. *Id.* The court also noted that due to the types of claims in the case, damages were not related to the gambling company's profitability. The court thus held that discovery of this marginally relevant information did not outweigh the potential injury it could cause the gambling company and denied the motion to compel. 250 F.R.D. at 659. The circumstances here are, of course, entirely different. As explained above, the State seeks discovery of information about a business acquisition transaction between two defendants for the purpose of establishing liability in this case. In addition, the confidentiality order provides ample protection to Simmons and Peterson to prevent any potential injury that could result from production of the information. Furthermore, to the extent the responsive documents also include information about profitability, that information is relevant in this action because there are claims for punitive damages in this case that are directly related to Defendants' net worth. *See Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 199 F.R.D. 677, 686 (N.D. Okla. 2001).

[DKT# 1207]. Accordingly, the requested information should be produced forthwith and Simmons' request for protection as to this request denied.

C. Request No. 3

The State's request no. 3 seeks "copies of any documents referring to or relating to reason(s) why Peterson Farms, Inc. decided to transfer its poultry operations to [Simmons]." *See* Ex. 1. Such information is plainly relevant. For instance, such materials may show that Peterson transferred its assets because it recognized the magnitude of the environmental liabilities its poultry operations were creating -- a clear admission against interest. Simmons also claims such evidence would be confidential, but as discussed above, the confidentiality order and the designations provided for in the order would provide ample protection for responsive documents. In short, the grounds Simmons has asserted in resisting this discovery request are without merit. As with the previous two requests for production, the requested information should be produced forthwith and Simmons' request for protection should be denied.

D. Request No. 4

The State's request no. 4 seeks "copies of any documents referring or relating to this lawsuit or the subject matter of this lawsuit that were exchanged between [Simmons] and/or Peterson Farms, Inc. (including any persons or firms acting or purporting to act on its behalf) in connection with [Simmons'] acquisition of Peterson Farms, Inc.'s poultry operations that was announced on or about June 3, 2008." *See* Ex. 1. Simmons' knee jerk reaction to this request is to claim that the State is requesting everything related to the defense of this case, and thus it objects claiming "any documents responsive to Request number 4 are protected by the joint defense doctrine." *Mtn.*, p. 7. However, the request specifically asks for documents relating to this case that were exchanged "in connection with [Simmons'] acquisition of Peterson Farms,

Inc.'s poultry operations." This case deals with pollution from poultry waste. Responsive materials might include, without limitations, documents reflecting the amount of poultry waste generated by Peterson's birds, the manner in which and locations where such waste has been disposed of, knowledge of the fate and transport of such waste, knowledge of environmental harms caused by such waste, and the like. Simply put, this request does not ask for all materials relating to the defense of this case. However, to the extent the transaction that accomplished Simmons' purchase of Peterson did address this case and the liabilities of Simmons and Peterson in this case, that information is clearly relevant.

III. Conclusion

For the reasons stated herein, Simmons' motion for protective order should be denied because the four requests for production seek relevant information regarding Peterson's liabilities in this case, and the confidentiality concerns of Simmons are remedied by the previously entered confidentiality order and the protections provided for in that order.

Respectfully Submitted,

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